Wolseley P. Emerton

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AS SET FORTH IN

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PERTINET, VEL AD RES, VEL
AD ACTIONES

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WOLSELEY P. EMERTON, D.C.L.

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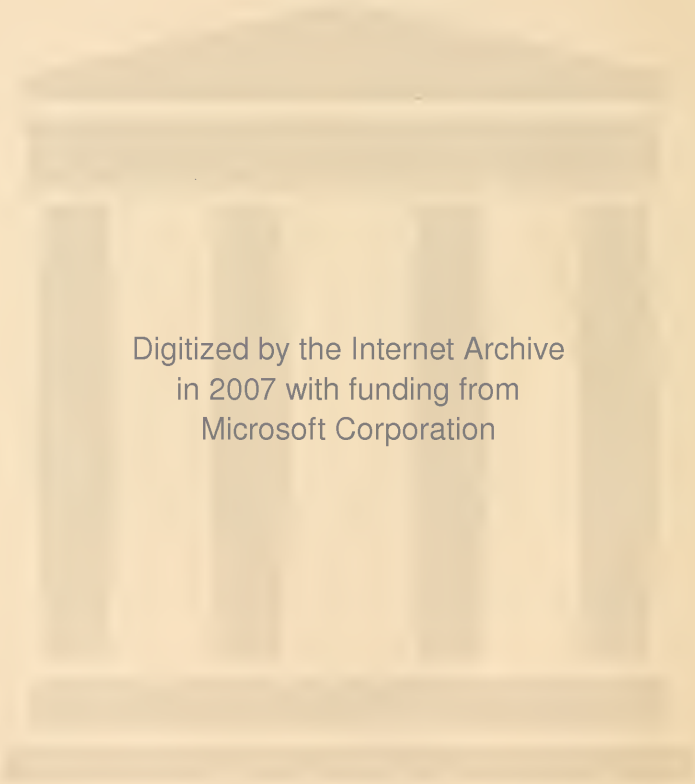
# PREFACE.

In the following pages Gaius, Ulpian, and Paulus are quoted according to the text given in the Novum Enchiridion Juris Romani of C. Giraud (Paris, 1873), but all quotations have been carefully compared with the more recently revised texts given in Huschke's Jurisprudentia Antejustiniana, fifth edition (Lipsiæ, 1886), and the slight variations in no way affect the argument.

The Epitome of Gaius is quoted from the Jurisprudentia Antejustinianea Vetus, of Schulting (Lipsiæ, 1737).

The work of Dr. Hammond, of which an abstract is given in Appendix II, appeared as an introduction to the first American edition of Sandars' Justinian (Chicago, 1876).

Banwell Castle, Somerset,
*September*, 1888.



# THE THREEFOLD DIVISION OF ROMAN LAW.

Although the classification of Law in general and of the Roman Law in particular, founded on the construction commonly assigned to this famous passage, has been often fiercely attacked and sometimes stubbornly defended, yet both the attack and the defence have related to the superstructure alone, no one (so far as I know and believe) having thought it worth while to examine the foundation of the whole theory, and to ask the question whether the words of the passage would naturally bear the construction sought to be imposed upon them.

Austin, indeed, seems to have deviated in so bold a manner from the plain meaning of Gaius that we might be tempted to suspect an intentional deviation did not Austin in other portions of his work insist so zealously upon verbal trifles [1], and those who have censured Austin have usually been far more ready to attack the commentator than to inquire whether he gave a fair representation of his authors. But it is surely our chief business to endeavour to ascertain what the Roman lawyers meant, and this, though not precisely the same question as, What is the meaning of the words employed by the Roman lawyers [2]? is at least so closely bound up with it as

[1] I mention Austin in particular as he is for the great majority of English students *the* writer on Jurisprudence, as is admitted by his most decided opponents.

[2] I have made some remarks upon this point and given some references to English legal writers in my dissertation 'De Conjecturis Ultimarum Voluntatum,' p. 6. Excellent illustrations are to be found in Cobbett's Letter XXI on Specimens of False Grammar, and an amusing one occurs in the memoirs of the late Rector of Lincoln College, where a young and successful aspirant

to furnish for its solution a presumption of the strongest kind[1]. And if we accept the strict and literal signification of the words as our guide to the sense of Gaius we find that in this instance the difference between the little words 'aut' and 'vel' must be accepted as the turning-point of the discussion. In this there is nothing to cause surprise. Greek societies have been convulsed about an iota, and the aid of the microscope has been invoked to detect a cross line; a degree of minuteness which, if somewhat tedious, has at least, compared with our English habits, the advantage of accuracy.

English words of one syllable have often been abandoned by a sort of common consent to infants and their instructors, and left ambiguous in a manner very convenient, at once to the idle schoolboy unable to discern, and to the sly commentator unwilling to set forth, a definite interpretation of a doubtful passage. Among these sounds, often employed and little dwelt upon, there is none more important than the conjunction 'or,' used to express alike the extreme difference of the exhaustive division by dichotomy, and similarity so great as to amount to complete equivalence[2]. The habit

to the honours of a university prize asks a pro-proctor the way to the 'Latin Rostrum.' The meaning evidently was that the youth wished to be guided to the pulpit from which he was to deliver his Latin Prize Composition. But his *words* indicated a wish to commit suicide, or at least to take a salt-water bath. See also Whately's Logic, Appendix i, on Ambiguous Terms.

[1] See Lindley on Jurisprudence (translated from Thibaut), pp. 47–50; Austin on Jurisprudence, Lect. XXXVII, and my Dissertation, pp. 8–10.

[2] 'Every B is A or not A.' Here, by the principle of Excluded Middle, A and not A together include everything, and mutually exclude each other, and 'or' indicates complete opposition. But in '$a \div b$ or $\frac{a}{b}$' 'or' serves to express complete similarity. 'True or false,' 'dissemble or cloke,' furnish more homely examples. But although this is the proper and correct sense of 'every' and of 'all' as laying down a rule without any exception, and as signs of the universal proposition; yet they are also (in ordinary speech) employed in a sense less correct, serving to express our belief that the proposition is true, not indeed universally, but in the vast majority, or at least in a very great number, of cases. As examples we may adduce Macaulay, when he asserts that 'Every schoolboy in an upper form knows,' and Izaak Walton, who, instructing and amusing his scholar in the shower, asserts that 'All men know' the fractional parts of the pound sterling. In such instances as these

once formed is carried into matters with which it has no concern, and it is not without some effort that the tiro in his first attempts at Latin composition learns to distinguish and to discriminate between 'aut,' 'vel,' and 'sive.' It is fortunate that any serious effort of the sort is usually preceded by a perusal of the first book of Caesar's Commentaries on the Gallic War, which gives an opportunity for a few remarks on the leading case of Dumnorix, involving at least the elements of the classical employment of 'aut' and 'vel' [1]. Apposite allusions and references to Cicero and Tacitus, Horace and Virgil, have indeed always abounded in the pages of Latin dictionaries and grammars, and these, whilst at once illustrating and enforcing the dicta of the compilers, and exhibiting the elegance and facility of their scholarship in their own domain, serve also to show how confined that domain is; for the writings of the jurists, nearly equal in bulk to the whole of the surviving literature of the golden and silver ages, and employing words with a distinctness and precision that would not have disgraced Aristotle, are rarely quoted even in those cases which stand most in need of illustration from their works, whilst readers, fresh from the licence of Horace and Catullus, treat with a most mistaken freedom the stern precision of Celsus, and the cautious accuracy of Proculus. And it were well if the evil ended here. But we find in too many

our knowledge of the world enables us to perceive the true meaning; but often we are not left to this resource, the context itself, or some parallel passage of the same author, serving to determine the sense in which his words are to be taken, e.g. in Exodus ix. 9 it is asserted that 'All the cattle in Egypt died,' and in ix. 19 Pharaoh is warned to bring in his cattle from the field.

And infra, p. 14, n. 1. Gaius appears, both from the parallel passage and from our extraneous knowledge of the subject, to have employed 'omnis' in the laxer sense.

[1] Bell. Gall. I. 19. So long as Caesar is described as contemplating the alternative modes of proceeding against Dumnorix as (*hypothetical*) *facts*, 'aut' is employed: 'Satis esse causae arbitrabatur quare in Dumnorigem 'aut' ipse animadverteret, aut civitatem animadvertere juberet.' But when further on Caesar states the same alternatives in his private conference with the brother of the accused, but leaves the choice to Divitiacus, 'vel' is used: 'Petit ut vel ipse de eo statuat, vel civitatem statuere jubeat.'

instances that the would-be critic, after putting a false construction on his author, proceeds to show how unphilosophical that author was, much as if he were to accuse Cicero of confounding courts of justice with soup kitchens merely because the 'Jus Verrinum' might perchance be distributed in both. In this small contribution to the elucidation of the subject I have set down some instances of the employment of 'aut' and 'vel' by the classical jurists from which, as it appears to me, interesting and important deductions may be made, and shall in the first place endeavour to show that this employment was strictly in accordance with the rules laid down by modern grammarians and lexicographers. Thus, for example, Dr. William Smith in his account of 'aut' derives it from 'alterum' (one of two, not both), and states that it introduces an alternative regarded *objectively* as a fact; whilst 'vel' from 'volo' also implies an alternative, but views it as still to be chosen, and therefore dependent on the will, or in other words introduces an alternative regarded *subjectively*[1]. Although I do not like the employment of the terms subjective and objective with reference to the views and practices of the ancient Romans, since such a habit is always apt to lead to the error of interpreting their sentiments through the utterly alien medium of the Kantian philosophy, yet I do not think any fault can be found with this statement so far as its general truth is concerned. For particular exemplifications Dr. Smith, after quoting Caesar and Dumnorix, goes on to add that 'aut' introduces an alternative, the acceptance or admission of which implies the rejection or denial of the connected alternative; but whether the coexistence of the alternatives is possible or

[1] Just as the same collocation of words (differing only in the insertion or non-insertion of the 'particula infinitans') may be employed either to affirm or to deny any proposition, so there is nothing to prevent the use of 'vel' in a sentence in which 'aut' would have laid down an 'objective' division perfectly correct in point of fact. But if 'vel' be so employed the author does not state anything with regard to the 'objective,' but confines his assertion to the 'subjective' truth of the proposition, or the 'subjective' existence of the division.

impossible is indicated by the context[1]. And Dr. W. Smith proceeds to add in the second place, That in logical arguments 'aut' introduces an alternative inconsistent with another alternative, so that both propositions cannot be true; its most frequent employment in this way is in those arguments called 'dilemmas'[2]. The employment of 'aut' in two disjunctive phrases may be regarded as a branch of the dilemma[3]. Again we may find 'aut' employed in the sense of 'or at least' in a limiting signification. And in the poets it is not uncommon to put 'aut' in immediate connexion with 'vel,' or 'vel' with 'aut,' though this licence does not occur in the prose-writers, and is indeed to be expected in poets alone, for 'vel' has a perfectly well marked set of significations of its own, with which the Roman jurists were so far from tampering that it would be impossible to convict any jurist (at least any jurist of the classic period) of using either 'aut' or 'vel' in any lax or inaccurate sense. On the employment of 'vel' subjectively and implying choice I have already quoted Dr. Smith. But some of the passages which he seems to regard as cases of choice I incline to think cases not of choice simply, but as cases in which free-will must necessarily be exercised, since the intellect regards the alternatives as absolutely equivalent, like Quirinus and Romulus with Cicero[4]. The abundance of materials for a judgment on this matter, to be found in the

[1] 'Truncis arborum aut admodum firmis ramis (abscisis).' Trunks of trees, or (if they were not to be had) very stout branches. Caesar, Bell. Gall. 7. 73.

'Ubi enim potest illa aetas aut calescere vel apricatione melius vel igni, aut vicissim umbris aquisve refrigerari salubrius.' Cic. De Sen. 16. 57. Here basking in the sun, or sitting by the fire are equivalent for the purpose of warming oneself, as are shade and water for the purpose of cooling. Vel therefore couples them. But heat and cold are mutually exclusive, and therefore properly separated by aut.

[2] 'Omnia bene sunt ei dicenda, qui hoc se posse profitetur, aut eloquentiae nomen relinquendum est.' Cic. De Orat. 2. 2.

'Aut quidquid igitur eodem modo concluditur, probabitis, aut ars ista nulla est.' Cic. Acad. 2. 30. 96.

[3] 'Res ipsa et reipublicae tempus aut me ipsum, quod nolim, aut alium quempiam aut invitabit aut dehortabitur.' Cic. Piso. 39. 94.

[4] De Officiis, 3. 10. 41, 'Pace vel Quirini vel Romuli dixerim.'

Roman jurists, makes a selection difficult, but it is on the whole a good rule to quote as little as possible from the Pandects, where we are never safe from the tampering of Tribonian and his coadjutors, and taking Gaius as our chief authority to employ Ulpian and Paulus as aids in elucidating his employment of words. The Fragments of Ulpian, known as the 'Regulae Juris,' furnish us with many good examples, and one in particular, of exhaustive division[1]. But I have found Paulus of more service, and therefore pass on to his 'Sentences,' in which, when setting forth a number of divisions assigned by the law (and therefore in the eyes of a lawyer divisions in the 'nature of things') Paulus employs 'aut'[2]; as also in a very striking way in his account of the crime and punishment of those who violate sepulchres[3]. So long as the question has to do with the will or point of view of the criminal 'vel' is employed. But the punishment to be assigned to the offender is made to depend not on the will or discretion of the judge, but on the rank of the criminal, a matter of fact beyond the control of the will, and accordingly

[1] Ulpian, Reg. Jur. XIX. 1, 'Omnes res aut mancipi sunt aut nec mancipi.'

[2] I. 3. 2, 'Procurator aut ad litem, aut ad omne negotium, aut ad partem negotii aut ad res administrandas datur.'

I. 10, '(Plus petendo) causa cadimus aut loco, aut summa, aut tempore, aut qualitate.' This seems to be a real division in the nature of things, and bears much resemblance to some of the Aristotelian Categories.

V. 4. 6, 'Injuriarum actio aut lege, aut more, aut mixto jure.' Here the division is legal, and is also intended to be exhaustive. 'Mixto jure' must be carefully distinguished from 'utroque jure,' which we shall meet with presently.

[3] I. 21. § 5, 'Qui sepulchrum violaverint, aut de sepulchro aliquid sustulerint, pro personarum qualitate, aut in metallum dantur, aut in insulam deportantur.' It must be noted that the violation of the sepulchre is one crime, and the theft of anything therefrom another crime, distinguished by the Law, and therefore aut is employed. But when things are either equivalent for the purpose in hand, or dependent on the will of the person concerned, we find 'vel.'

I. 21. 1, 'Ob incursum flumines vel metum ruinae.'

I 21. 4, 'Perpetuae sepulturae traditum vel ad tempus alicui loco commendatum.'

I. 21. 6, 'Effregerit vel aperuerit.'

'aut' is used. But when it rests with the prosecutor to employ at his pleasure actions involving, or not involving, infamy, we find 'vel.' We may also notice that Paulus when treating of 'commodatum,' 'depositum,' and 'pignus,' uses 'vel' so long as he discusses the expenditure of money by the bailee on the thing transferred, since this was with him a matter of choice[1]. But when he mentions accidents, the results not of choice but of natural forces, he employs 'aut'[2]; and again in the following paragraph 'vel' is used, as the slave and the horse are equivalent so far as the matter in hand is concerned, and to expose either to the hazards of robbers or battle is clearly dependent on the will or choice of the bailee[3]. 'Aut' is used in III. 4*a*. 8[4], as we there find opposed alternatives amounting to contradictories, whilst in III. 4*b*[5] the great complications of the instances makes them very instructive. In those things which depend on the will of the testator, such as the insertion of illegal or immoral conditions, 'vel' is used; as also when the question of substitution in the second or third place arises, as it is clearly at the discretion of the testator to substitute any one in any grade he pleases. But in § 1, with the natural division into possible and impossible, and § 4, with the legal division into instituted and substituted, we find 'aut,' as also in the case of the difference between 'barbarus' and 'larvalis,' which is not a difference made to depend on the choice of the testator, though it would be otherwise

[1] II. 4, 'Quidquid in rem commodatam ob morbum vel aliam rationem impensum est a domino recipi potest.'

[2] 'Si facto incendio, ruinae, naufragio aut quo alio simili casu.'

[3] II. 4. 3, 'Servus vel equus in aliam causam commodati, si a latronibus vel in bello accisi sunt.'

[4] III. 4*a*. 8, 'Sane valet testamentum id quod ante captivitatem factum est, si revertatur, jure postliminii; aut si ibidem decedat, beneficio legis Corneliae.'

[5] 1, 'Conditionum duo sunt genera; aut enim possibilis est aut impossibilis.'

2, 'Conditiones contra leges et decreta principum vel bonos mores adscriptae nullius sunt momenti.'

4, 'Heredes aut instituti aut substituti dicuntur; instituuntur primo gradu, substituuntur secundo vel tertio scripti.'

had he made an actual choice between them. But even Paulus may be dwelt on too long, and I therefore, by way of leave-taking, give a few examples in which 'aut' and 'vel' are much involved, yet used with strict accuracy, e.g. V. 15. 5: 'Qui falso vel varie testimonia dixerunt vel utrique parte prodiderunt, aut in exilium aguntur, aut in insulam relegantur, aut curia submoventur.' Here we find 'vel' used, for the misconduct of the witness is under the control of the will. But when varieties in legal punishment are to be distinguished, we find 'aut'; and again in the next section, where legal varieties of testimony are to be distinguished, 'alias autem jurejurando aut testibus explicantur.' We may find another example, V. 4. 11, where two legal punishments are mentioned: (1) Enforced absence, (2) Degradation. 'Omnes enim calumniatores exsilii vel insulae relegatione aut ordinis amissione puniri placuit.' But the former has two varieties which depend on will, viz. exile and relegation, both of which, whilst bearing some resemblance to each other, differ widely from the latter. The little fragment preserved by Dositheus, and now generally attributed to Cervidius Scaevola, has at its commencement a passage which at once illustrates some of the functions of 'aut' and 'vel,' and serves to set forth a view of the Jus Naturale and the Jus Gentium, from which the discordant opinions of Gaius and Ulpian may easily have arisen. The opening sentence is, 'Omne enim jus, quo utimur, aut civile appellatur; aut naturale vel gentium.' Here we find 'aut' used for things really in opposition, or distinguished by their natures. But where two words, 'naturale' and 'gentium,' can be employed at our pleasure to signify the same thing, 'vel' is employed. All this however, though useful as a preliminary, is but a mere preliminary to the important question of the use made of these particles by Gaius. Paulus and Ulpian have (excepting as preserved in the Pandects) been known to few and had but little influence, whilst Gaius, as the foundation of Justinian's In-

stitutes, has had a wider influence on the form of legal thought than any other jurist we can name, and therefore his employment of particles used in almost every logical division becomes of the utmost consequence. I have already given as my opinion that the usage of 'aut' and 'vel' is in Gaius strictly regular, and it is needless to show that regularity is the rule[1]. But as some passages may be adduced which seem at first sight to favour an opposite view it will be necessary to examine them, and when closely looked at they will be found not hostile or even neutral, but staunch allies of the views I express. Taking, for example, the passage Gaii Comm. I. 54[2], we might at first sight expect 'aut' instead of 'vel.' But the division is not exclusive. On the contrary, owing to the possibility of the rights coinciding in the same person, it is a cross-division. Therefore 'aut' could not have been used. As a real example of an exhaustive division we may quote I. 159, and here 'aut' is employed. For although the loss of liberty includes the loss of citizenship, and the loss of citizenship the loss of family rights, yet this is not in a legal point of view a cross-division; the losses of the lesser sort being indeed consequential, but not related to each other as species to genus[3].

[1] To guard against misapprehension I may state that before writing this paper I went carefully through Gaius, noting every passage in which he employed either 'aut' or 'vel.'

[2] 'Ceterum cum apud Cives Romanos duplex sit Dominium, nam vel in bonis, vel ex jure Quiritium, vel ex utroque jure cujusque servus esse intelligitur.'

This must be carefully distinguished from 'mixto jure' which is not a case of two jura coinciding, but of a right composed of portions of each, so that the action 'mixto jure,' e.g. actio communi dividundo, finium regundorum, &c. is not a coincidence of two rights, but rather a single right with a double aspect. Two rights coinciding in the same person may be compared to the mechanical mixture of iron filings and sawdust, and to regard such a mixture as a 'species in itself' would amount to a cross-division.

But 'mixto jure' is like chemical compound, just as water is a distinct 'species' from each of its constituents oxygen and hydrogen, and no cross-division is involved by classing it as such.

[3] I. 159, 'Nam aut maxima est capitis diminutio, aut minor, quam quidem mediam vocant, aut minima.'

At the beginning of Book II [1] we might (it may be said) have expected Gaius to employ 'aut' in his division of 'res' into those 'in nostro patrimonio' and those 'extra nostrum patrimonium,' as this division appears at first sight to be not only exclusive but exhaustive. And had Gaius, like Justinian, made this division a primary one, and the basis of other divisions, there would be much to be said for this view. But so far is Gaius from doing this that he never formally employs it again, seeming to look upon it rather in the light of a casual though useful observation. Moreover, the various sorts of things included in 'res in nostro patrimonio,' and in 'res extra nostrum patrimonium,' such as land, edifices, etc., are alike capable of particular enjoyment, though the law may, as in the case of 'res extra nostrum patrimonium,' prevent them from being particularly enjoyed.

In § 92 [2] the use of 'vel' is due to the fact that the two things are equivalent so far as the matter in hand is concerned, and the same remark applies to § 99 [3].

But in § 101 [4], where a formal legal division is to be made, 'aut' is in place as we find it, as we do also in § 144, where we might have expected 'vel' in at least some of the cases of exclusion which seem to depend on the will or choice of the person favoured, yet as they are all looked upon as parts of a legal division 'aut' is employed [5].

[1] II. 1, 'Modo videamus de rebus, quae vel in nostro patrimonio sunt, vel extra nostrum patrimonium habentur.'

[2] II. 92, 'Itaque quod extra duas istas causas adquiritur, id vel ad ipsum pertinet, si liber est, vel ad dominum si servus est.'

[3] II. 99, 'Ac prius de hereditatibus dispiciamus quarum duplex conditio est; nam vel ex testamento, vel ab intestato ad nos pertinent.' Nor were these the only modes of universal succession.

[4] II. 101, 'Testamentorum autem genera initio duo fuerunt; nam aut calatis comitiis faciebant, quae comitia bis in anno testamentis faciendis destinata erant aut in procinctu, id est cum belli causa ad pugnam ibant.'

[5] 'Ideoque, si quis ex posteriore testamento quod jure factum est, aut noluerit heres esse, aut vivo testatore, aut post mortem ejus, antequam hereditatem adiret, decesserit, aut per (cre)tionem exclusus fuerit, aut conditione, sub qua heres institutus est, defectus sit, aut propter caelibatum ex lege Julia summotus fuerit ab hereditate.' 'Vel' might here have been used throughout,

In § 164 there is an exhaustive division by means of 'adeant' and 'non adeant.' Standing by itself this would require 'aut,' but as it is put by 'deliberandi' at the choice of the 'extraneus haeres' 'vel' is employed with perfect regularity[1].

Another good instance of obvious choice or will exercising so powerful an influence over the construction as to make the usual rule impossible to be observed without awkwardness is § 167[2], where we have a string of words divided by 'aut' (the writer wishing to oppose alternatives) till at last with 'nuda voluntas' 'aut' would be too much like a contradiction, and 'vel' is substituted by a sort of attraction.

In § 213 certain transfers from the heir to the legatee are regarded from the point of view of choice, and we find 'vel'[3].

In the next paragraph the same things are looked at from the point of view of compulsion or necessity, and 'aut' is employed[4].

In § 287 there is a very singular example, 'same' and 'similar' being opposed to each other, whilst 'uncertain person' and 'afterborn stranger' are equivalent so far as the matter in hand is concerned, as both come under the same rule, and we accordingly find 'aut' used in the case of opposition and 'vel' in the case of equivalence[5].

but in that case our attention would have been directed towards the uncertainty of human things, or to the mutability of the human will, not towards the rigidity of legal rules and legal distinctions.

[1] II. 164, 'Extraneis heredibus solet eretio dare, id est, finis deliberandi, ut intra certum tempus vel adeant hereditatem, vel si non adeant, temporis fine submoveantur.'

[2] II. 167, 'At is qui sine eretione heres institutus est, aut qui ab intestato legitimo jure ad hereditatem vocatur, potest, aut cernendo, aut pro herede gerendo, vel etiam nuda voluntate suscipiendae hereditatis heres fieri.'

[3] II. 213, 'Sicut autem per damnationem legata res non statim post aditam hereditatem legatarii efficitur, sed manet heredis eo usque, donec is rem tradendo vel mancipando vel in jure cedendo, legatarii propriam faciat.'

[4] II. 214, 'Sunt tamen, qui putant, ex hoc legato non videri obligatum heredem, ut mancipet aut in jure cedat, aut tradat.'

[5] II. 287, 'Eadem aut simili ex causa autem olim incertae personae vel

In Book III. § 88, where Gaius opens one of the principal divisions of his subject with a paragraph, which at first sight seems completely at variance with the rule I have laid down, 'That in cases of exhaustive division "aut" must be employed, if attention is intended to be called to the division as such,' the difficulty is solved by comparing the passage from Gaius, 'Aureorum,' Book II, preserved in the Digest XLIV. 7. 1, from which it appears that the division here given is not intended to be exhaustive[1]. In the very next paragraph (89), where the division is really exhaustive, 'aut' is used[2].

In III. § 128, we have another passage of the same class[3]. For in § 128 the division of literal contracts is only by way of example and shown by § 134 not to be exhaustive[4]. And the Epitomator, when he makes it exhaustive, substitutes 'aut' for 'vel'[5].

But in § 141 the division is exhaustive and at the same time exclusive, there being no cross-division, though at first sight we might suppose one to exist[6]. For 'fundus' is put by way of example for immoveable, 'toga' for moveable, whilst 'homo' stands for that peculiar sort of property in

postumo alieno per fideicommissum.' Compare Whately's account of 'same' and 'similar' in his Logic, Appendix 1.

[1] III. 88, '(Nunc transeamus) ad obligationes, quarum summa divisis in duas species deducetur; omnis enim obligatio vel ex contractu nascitur vel ex delicto.'

D. XLIV. 7. 1, 'Obligationes aut ex contractu nascuntur, aut ex maleficio, aut proprio quodam jure ex variis causarum figuris.'

[2] 'Et prius videamus de his, quae ex contractu nascuntur. Harum quatuor genera sunt; aut enim re contrahitur obligatio, aut verbis, aut literis, aut consensu.'

[3] 'Literis obligatio fit, veluti nominibus transcriptitiis, fit autem nomen transcriptitium duplici modo; vel a re in personam, vel a persona in personam.'

[4] III. 134, 'Praeterea litterarum obligatio fieri videtur chirographis et syngraphis, id est, si quis debere se aut daturum se scribat; ita scilicet si eo nomine stipulatio non fiat.'

[5] 'Literis obligatio fit, aut a re in personam, aut a persona in personam.' Breviarium Alaricianum, II. 9. 12.

[6] III. 141, 'Pretium in numerata pecunia consistere debet (nam?) in ceteris rebus an pretium esse possit, veluti homo, aut toga, aut fundus, alterius rei pretium esse possit, valde quaeritur.'

human beings, which in Roman Law differs so considerably from both [1].

In Book IV. § 118 [2], 'vel' is employed, the distinction being a distinction of point of view, and not depending on mode of legal origin or on anything 'objective.' For in one sense all exceptions arise from the jurisdiction of the prætor, and consequently that jurisdiction would not differentiate any one exception from any other. The jurisdiction of the prætor is the only cause given, law and usage being merely occasions or models for its exercise.

And yet another instance of the employment of 'vel' to indicate 'subjective' division or division in relation to point of view merely is, I believe, to be found in the famous passage, 'Omne autem jus quo utimur, vel ad personas pertinet, vel ad res, vel ad actiones [3].' But as this passage is of vast import-

[1] It is not very common to make an example introduced by 'veluti' exhaustive, but still there is nothing to prevent it from being exhaustive. We may for instance say 'British subjects such as soldiers and lawyers,' which would not be an exhaustive division. But we may also say 'British subjects as peers or commoners,' which would be exhaustive. And in the Pandects good examples of sentences containing 'aut,' and introduced by 'veluti,' may be found in the fragment of Proculus quoted at p. 17, n. 3, some of them being exhaustive divisions.

[2] 'Exceptiones autem alias in Edicto Praetor habet propositas, alias causa cognita accommodat; quae omnes vel ex legibus, vel ex his, quae legis vicem obtinent, substantiam capiunt vel ex jurisdictione Praetoris proditae sunt.' An opposite example may be found in IV. 140, 'Omnia interdicta aut restitutoria aut exhibitoria, aut prohibitoria vocantur.' And in IV. 142 this is repeated as the principal division followed in § 143 by subordinate divisions distinguished by 'vel.'

IV. 143, 'Sequens in eo est divisio, quod vel adipiscendae possessionis causa comparata sunt, vel retinendae, vel recuperandae.' See Appendix.

[3] The professed translators generally pass by the difficulty. Mr. Sandars renders the passage 'All our law relates either to persons, or to things, or to actions.'

Mr. Moyle, 'The whole of the law which we observe relates either to persons, or to things, or to actions.'

Mr. Poste, 'The whole of the law by which we are governed relates either to persons, or to things, or to procedure,' and these renderings admit either the 'objective' or the 'subjective' construction.

But Dr. Hunter in his 'Exposition of the Roman Law' (p. 124, second edition) paraphrases it thus: 'All our law may be divided into three branches,

ance, coming to the front in almost every attempt to classify the Roman Law, and has also in spite of the efforts of Duarenus (Disp. Anniv., i. 55) among the older, and of Hammond (Inst. of Justinian, Chicago, 1876) among the more recent commentators, been very generally misunderstood, I have reserved it for a few concluding remarks. For it appears to me that Gaius, instead of intending (as he is commonly supposed to have intended) to map off the Law into three different districts, or to divide its mass into three different heaps, viz. those of the Jus Personarum, Jus Rerum (quod ad res pertinet), and Jus Actionum (quod ad actiones pertinet), intended to express the fact that the whole body of the Law may be regarded at our pleasure from any one of three different points of view, i.e. from the point of view of Persons as capable of exercising Rights, from the point of view of Things over which the Rights are exercised, or from the point of view of Actions by means of which Rights are enforced; just as if we wish thoroughly to understand or explain the structure of a ship, we inspect the longitudinal section, the transverse section, and the plan, so as to obtain a view of all her internal construction and fittings from three different points, without any thought of objective difference in the things viewed on each occasion. That the opinion generally received on this point is an opposite one sufficiently appears from the testimony of Sir Henry Maine to the 'general agreement of modern writers on Jurisprudence[1],'

for it relates to persons, to things, or to actions;' and this reading is plainly 'objective.'

I am quite ready to admit the perfect correctness of the renderings of the passage as set forth by Messrs. Sandars, Poste, and Moyle; but as the original is plainly elliptical, this question arises, 'What words must be supplied to complete the sense as intended by Gaius?' In my opinion we are led (whether we follow the strict meaning of the words employed by Gaius, or pursue to their legitimate conclusions the results of the alternative constructions) to suppose our author to have meant his ellipsis to be filled up with 'according to the point of view from which we regard it.'

[1] Early Law and Custom, pp. 362 and 364.

but the examples I have already given suffice to show that if Gaius really meant to say what he has generally been supposed to mean, he went strangely out of his way when he used 'vel' instead of 'aut.' If, as modern writers have generally supposed, he *meant* to divide the Corpus Juris into three heaps, he on one single occasion in his voluminous writings used 'vel' in the sense of 'aut,' a supposition not to be made by anyone who wishes to derive his opinions from the text, instead of seeking in the text support for his opinions.

The passage often quoted in the annotated editions of Gaius from Donatus, as though it were parallel to that now under consideration, is really of a converse character[1]. For Donatus really means to make an exhaustive division of the matter in hand, depending not on opinion or on point of view, but on its own nature and on fact.

Cicero does the same when treating of Confirmatio in the 'De Inventione,' and both authors accordingly use 'aut' with perfect accuracy[2]. Nor are we in this matter left to judge of the views of Latin writers and jurists from example and inference merely. A fragment of Proculus preserved in the well-known title of the Digest 'De Verborum Significatione[3],' serves to show very plainly that the disjunctive and subdisjunctive force of 'aut' was fully known to and

[1] Donatus ad Terent. Adelphi, 2. 3. 1, 'Omne quod geritur, aut in rebus est, aut in personis, aut in attributis eorum.'

[2] Cic. De Invent. I. 24. 34, 'Omnes res argumentando confirmantur, aut ex eo quod personis, aut ex eo quod negotiis est attributum.'

[3] D. L. 16. 124, 'Haec verba Ille aut Ille non solum disjunctivae sed etiam subdisjunctivae orationis sunt. Disjunctivum est; veluti cum dicimus "Aut dies aut nox est" quorum posito altero necesse est tolli alterum. Ita simili figuratione verbum potest esse subdisjunctivum. Subdisjunctivi autem genera sunt duo. Unum cum ex propositis finibus ita non potest uterque esse, ut possit neuter esse; veluti cum dicimus "Aut sedet aut ambulat." Nam ut nemo utrumque simul facere, ita aliquis potest neutrum, veluti is qui accumbit. Alterius generis est, cum ex propositis finibus ita non potest neuter esse, ut possit utrumque esse; veluti cum dicimus, "Omne animal aut facit aut patitur." Nullum est enim quod nec faciat nec patiatur; at potest simul et facere et pati.' So far Proculus. Cujacius in his commentary on the passage (VIII. 548) regards Proculus as having derived this from the Stoics, to whom also he was indebted for 'Aut dies aut nox est.'

realised by the jurists of the classic period, and Gaius would consequently be very unlikely to make an inaccurate substitution of 'vel,' not in a passage of small moment, but in one which the supporters of the common opinion maintain to have been the very foundation of the favoured classification.

Such then are the direct arguments which lead me to think the ordinary interpretation of this famous passage to be erroneous. But we may also derive a strong indirect argument from the difficulties which follow from the common view. These have been dwelt upon by the whole school of Bentham and Austin even to exhaustion, though apparently no suspicion crossed the minds of the critics that they might have mistaken the meaning of their author, and some even of his editors have been disloyal enough to attack Gaius whilst doing homage to his writings, and, after first supposing him to have written inaccurately, have turned the conjectural inaccuracy of diction into a far graver inaccuracy of thought. Gaius has been supposed not to have noticed that any such division would be a cross-division, as any member of it involves every other; and in the case of actions not even an apparent severance from the other two members can be effected. This is doubtless true, but it is so obvious that the modesty of the critics might well have been alarmed, and they might rather have suspected that they had misunderstood their author, than that their author had talked nonsense. Their point too, such as it is, had been made at least as early as the sixth century, Theophilus in his Paraphrase expressly stating that where there are Persons there must be Things, and that Actions cannot be far off when both these exist, a statement on the part of the Commentator which ought in itself to be sufficient to free Gaius from the charge of ignorance or carelessness. If it be asked what has led men of such ability and learning to so strangely neglect the obvious and primary meaning of their author, I venture to offer with great diffidence the following conjectural explanation. The

civilians of the seventeenth century had an extreme fondness for novel and systematic arrangements of the Law. Reform of Law meant with them reform of law-books [1], and any arrangement which seemed at once to be an alternative for the order of the Digest, and to have the sanction of classical authority, was of course eagerly caught at. In spite of the warnings of Duarenus [2] an essential distinction was supposed to exist where Gaius intended nothing more than to assert the greater convenience of a particular point of view; and the increased importance in the plan of study which the Institutes of Justinian, as opposed to the Digest, continued to acquire throughout the eighteenth century, served to confirm the error.

[1] Sir H. Maine, 'Early Law and Custom,' p. 363.

[2] A brief abstract of this passage of Duarenus is printed in Gotofred's annotated edition of the Corpus Juris, and the whole passage is printed at length as an appendix to Böcking's edition of Gaius. Duarenus states, 'Videntur autem nobis plerique errorem hausisse ex verbis Gaii Inst. I. cum ait "Omne jus vel ad personas pertinere, vel ad res, vel ad actiones." Haec enim verba sic intellexerunt, quasi nulla sit aptior, nec commodior juris tractandi docendique ratio, quam si de his tribus separatim disseratur. Verum longe aliter sensisse Gaium non dubito, nempe nullam partem juris esse, nullum contractum, nullum negotium, nullam actionem, nullum judicium, in quo tractando hi loci simul non incurrant.'

# APPENDIX I.

Since the foregoing pages were written I have been favoured with the criticisms of a distinguished member of the sister University, who, whilst doing me the honour to state 'that in his opinion my interpretation of the passage in Gaius (Omne jus quo utimur, etc.) is the only reasonable one,' nevertheless declines to accept my view of the employment of 'aut' and 'vel' by the Roman jurists as an invariable rule, but seems inclined to admit it so far as regards the general practice. Proceeding to give reasons for this opinion, he mentions as the first passage of importance that given by me, p. 14, n. 1, on which my critic remarks that the use of 'omnis' shows that the division is meant to be exhaustive. I have replied to this by an addition to p. 4, n. 2. Again, at p. 14, n. 6 my critic alleges that 'aut' is clearly not exhaustive, as is proved by the use of 'veluti,' which introduces examples and not a complete enumeration. I have replied to this by an additional note on the next page.

At p. 15 my critic objects that though 'the division in IV. 143 is based on a different principle from that in IV. 140, the divisions in 143 are as mutually exclusive as in 140.'

To this I reply that the division in 143, if exclusive, is manifestly not exhaustive, and being a subordinate division there would be no occasion for 'aut' unless the author intended expressly to call attention to the fact that the division was exhaustive or exclusive. And besides this, as Ortolan in his commentary on the parallel passage in the Institutes (where, by the way, Justinian uses 'quaedam,' not 'vel') expressly states, the Interdicts named in § 143 may *from another point of view* be ranked as 'prohibitory' or 'restitutory'; which furnishes another reason for the employment of 'vel.'

At p. 14, n. 3, the objection is made that 'the division of nomen transcriptitium' is in fact exhaustive, but 'nomen transcriptitium' is itself only a species (veluti) of literal contract. Therefore though other species of literal contract are given in § 134, this does

not at all affect the exhaustiveness of the division of 'nomen transcriptitium.'

Much of what I have said immediately above will apply to this case also. But I may also point out that the Epitome of Gaius (Breviarium Alaricianum) making the statement concerning literal obligations in general, which the MS. of Gaius does about the 'nomen transcriptitium,' employs 'aut'—'Litcris obligatio fit aut a re in personam aut a persona in personam.' (Brev. Alarie. II. 9. 12.)

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# APPENDIX II.

Dr. Hammond's book is so rare in England, and his Introduction is at once so suggestive and so little known, that I have been led to append an abstract of its contents to my own remarks on the threefold division of Roman Law. His aim is more ambitious than mine, as he deals with the classification of Law in general, whilst I have merely attempted to set forth the meaning which the Roman lawyers attached to their own expressions. But different methods have led us to conclusions so similar, as at once to increase my hope that they are correct, and my desire to make the views of the American Professor easily accessible to the English student.

*Abstract of Hammond's Introduction to Sandars' Justinian.*

The works of the Roman jurists are to be looked upon as the precursors of Blackstone, Kent, and Story.

There is no ground for the common belief in the radical diversity of the Civil and Common Law in methods, principles and sources, and no such opinion held by Coke, Selden, and Hale; Selden being quite correct, when in his notes to Fortescue, De Laudibus, cap. XV, he thus describes the formation of the Digest: 'They *extracted the best ruled cases* which lay dispersed in 2000 volumes of ancient law-books, and threw them into one body or collection [1].

The Roman lawyer, no more than the English or American,

[1] I am compelled to be content with a bare statement of Dr. Hammond's views.—E.

began the construction of their system with axioms or principles from which they could reason out the rules applicable to particular cases, or by the help of which they could construct a formal system of law in advance of occasions for its application [1]. That no such principles were known to them, until they formed them by induction from actual cases, will be evident on a moment's reflection to the merest tiro.

Even the more important collections of law, as the XII Tables, the Perpetual Edict, the Pandects and the Code, were destitute of scientific order [2].

The Decemvirs simply began with the first step taken by a party in commencing an action at law, and went on adding one provision after another, guided only by a natural sense of fitness and connexion in the selection and arrangement of topics [3]. And whether the Perpetual Edict was divided into ten or into seven parts it (at least in this respect) resembled the Twelve Tables, though of course neither the Jus Publicum nor the Jus Sacrum could find any proper place in the Edict. And such was the position held in the estimation of the legal profession by the Commentaries on the Edict, deficient as they were in scientific order, that the Institutional treatises, in which an attempt at methodical arrangement was really made, held but a very subordinate place.

The arbitrary order of the Twelve Tables afterwards elaborated in the Edict, the Pandects, and the Code, continued to determine the external form of the Civil Law down to the seventeenth century, and did not lose all its power till the eighteenth.

Cujacius in the sixteenth century may be considered as the real founder of the historical method, and though many attempts were made to reduce the Civil Law to systematic, the legal and traditional order still held its ground. And any attempt is foredoomed to failure (however successful it may seem for a time) unless it is based upon the work done by preceding generations and the principles already received into the positive law of the period.

[1] I am unable to agree with Dr. Hammond on this point. I regard the Roman lawyers as having employed imaginary cases to a great extent, their mode of legal education giving every facility for such a course of proceeding.—E.

[2] Much depends on the definition of 'scientific order' which we accept.—E.

[3] And what is this but a scientific arrangement?—E.

Such was the fate of Domat with his 'Civil Law reduced to its Natural Order[1],' in which he attempted to reduce all the contents of the Roman Law under deductions from the two principles given in the Gospel (Matt. xxii. 37–40), and then to arrange them all under the two categories of Engagements (all obligations from one party to another, whether arising ex contractu or ex delicto) and Successions (the law of wills, inheritance, and all the rights given by the death of a person). It is a remarkable coincidence, to say the least, that the Arabian jurists, whose writings could hardly have been known to Domat, make precisely the same division of the entire body of law into the two parts of Obligations or Engagements and Successions[2].

We may regard Domat's book as a very elaborate attempt to ignore all the principles of classification found in the Roman Law itself, and to construct a new system upon (supposed) Christian principles. Every such attempt must disregard the boundaries between Law and Ethics, or rather deny their existence.

But the credit of having given the death-blow to the 'legal order' and led the way to the more scientific distribution of the modern treatises belongs to Leibnitz, who first pointed out the unity and the organic character of Law, and was followed by Thomasius, who separated Law from Ethics, and thus paved the way for a classification of the contents of the former science[3]. Public Law with its branches, Criminal Law, and the Law of Procedure was separated from the Private Law, and the exegetic causes of the latter on all the books of the Corpus Juris were reduced to two, viz. a course on the Institutes for beginners, and one on the Pandects, comprising the chief body of instruction in the law schools. This change has deeply affected the arrangement of English legal treatises, the order adopted by Hale and Blackstone having been based on that of the contemporary civilians.

[1] There is an English translation of this work, by William Strahan, LL.D.; 2 vols., folio; Lond. 1722. The same theory of law, though not the same arrangement, is found in Bowyer's 'Universal Public Law;' Philadelphia, 1855.

[2] See 'Commentary on the Siradschijah,' Works of Sir William Jones, vol. viii. 265.

[3] Thomasius thus laid the basis of the celebrated distinction between Perfect and Imperfect 'Obligations,' as differentiated by the element of Constraint. The view acquired some popularity in Great Britain through Hutcheson, and was for a long time universal in Germany owing to the influence of Kant.—E.

And this cannot be understood without reference to the Internal as well as to the External Classification of Roman Law [1].

By Internal as opposed to External Classification is meant such an arrangement as is based on the nature and qualities of the matters classified, without reference to the order in which they are actually presented in a given work or body of Law. As examples may be given the Internal division of Law into Written and Unwritten, which, although it pervades every system of Law known to us, has never (if indeed it could be) employed to divide the whole law into two masses, one containing the Written and the other the Unwritten law.

The division into Public and Private Law, on the other hand, is sometimes employed as a basis for External classification, and has some practical utility; but the Internal or Essential distinction of Public and Private Law has never been stated with accuracy sufficient to make it of much service for the purposes of scientific jurisprudence.

In a strictly scientific arrangement the Internal and External classifications ought to correspond, and in the physical sciences this can, to a great extent, be done [2]. But the external arrangement of great part of the Positive Law is something settled for the scientific jurist by an external power, and the classification of the Law is thus attended with peculiar difficulties. For an attempt, however successful, to state the contents of a given statute or code in terms of scientific precision may be made nugatory by the slightest change, which at once transfers all his labours from the field of Positive to the field of Speculative Law.

Attempts, like that of Bentham, to re-construct the entire edifice

[1] This distinction is illustrated by the division of the History of Law in general and of Roman Law in particular into Internal and External, which is at least as old as Leibnitz, who remarks, 'Jurisprudentiae historia est vel interna vel externa. Illa jurisprudentiae substantiam ingreditur; haec adminiculum est tantum requisitum. Historia juris interna est, quae variarum rerum publicarum jura recenset.'

The External history would thus have for its object to set forth the history of the text of Statutes and other sources of Law, of customs, of legal doctrines, and the successive modifications which each of these underwent. This division is often called simply the History of (Roman) Law.

The Internal history is often styled the Antiquities of Law. It states and explains the doctrines derived from the sources above mentioned, and traces the origin, progress, fortunes, and decline of each legal principle.—E.

[2] Of course such a classification has reference to the state of the science at the time. In a progressive science there can be no perfect and final internal classification.

of a nation's law on what seemed at the time cannot but fail. For before such a system could overcome its first unpopularity, men had learned to regard Law as something different from Legislation, which was all that Law meant in the eyes of Bentham and his contemporaries.

The true object of study should rather be the ordinary methods of classification which have been used by the great body of jurists and practitioners in any age; and the gradual changes produced in those methods by causes of different kinds. Among these causes must be reckoned individual systems framed by men like Bentham. But the effects of causes like these are small when compared with the effects of other causes mostly unconscious and secular in their operation.

By such a process (as it seems) grew up within the Roman Law a method of Internal Classification, which has maintained its ground from the days of Gaius to our own, and appears to be the only method on which we can hope to see the union of External and Internal system. It is interwoven in the structure of the entire work before us, and is briefly stated in the famous sentence, 'Omne Jus quo utimur vel ad personas pertinet, vel ad res, vel ad actiones.' It may seem strange that the Roman jurists did not attempt to arrange the whole body of law according to the system of Gaius and the Institutes, instead of adhering to the traditional order of the Edict.

But had they done so, and carried out the plan to its full extent, they would have been obliged to state the whole Law thrice over:—

1. With reference to the Persons its Subjects.
2. With reference to the Things its Objects.
3. With reference to Actions its Remedies.

And if the whole law had been stated as Jus Personarum, it would be found to consist of two parts; one, and much the larger part, would consist of all the rules of law applying to all persons alike; the other and smaller part would be the rules of law applicable to particular classes of persons only. The latter would admit of easy and complete classification according to the classes of persons, but the former would be incapable of classification unless we went beyond the 'Jus Personarum' for the principle of classification. And thence it would easily happen that the term Jus Personarum would be used in a particular sense, to describe that

portion of the Law which was stated or classified with reference to the persons affected by it, to the exclusion of the much larger body of law that affected all persons alike without reference to status [1].

Again, when our imaginary and systematic writer came to the 'Jus quod ad res pertinet' (Jus Rerum), he would state the whole law over again, but he would now state it with reference to the Objects of the Law. And here again he would find that a part of the Law would apply to all Things alike, whilst the rest of it would be so sub-divided that the great mass of law applying to all Persons alike, could be properly classified and arranged according to the objects of each provision. The two classifications would thus mutually supplement each other; but as the variety of things in the world is much greater than the variety of persons in any given system of law, it would follow that a much smaller portion of the law would be left unclassified (as applying to all things alike) than in the law of Persons. Comparing his two pieces of work our imaginary jurist would find that much more of the law could be distinctly and satisfactorily stated under that of Things than under that of Persons, and that in general the two would supplement each other, almost every rule of Law finding a place in the sub-divisions of one or the other system. It would then be an easy step to omit those portions of each system which were superfluous and combine them into a single system of Law, in one part of which the principle of division was that of the first system and in the other that of the second. And although neither this nor the preliminary work, as above imagined, was ever done by any one man, this result was attained in legal science by centuries of gradual approximation.

Our imaginary jurist would then go on to the 'Jus Actionum,' and state the whole of the Law over again according to the remedies which it provided. But for many reasons this would be of less consequence in the formation of the system, for Actions, so far as they correspond to Rights, would already have found a place among Res [2]. And even if the statement had been carried out in

[1] The Law of Persons is thus eminently the Law of Unequals.—E.

[2] 'Jura Actionum' may be translated either 'Rights of Action,' or 'Rules of Action,' and seem in the Institutes to have the latter signification. If we adopt the division (external) into Public and Private Law, all that portion of the Jus Actionum which does not come under the Jus Rerum does not belong to the Private Law at all, but should be placed, as Procedure now usually is, under the head of Public Law. Those who, like Hale and Black-

full completeness, the positive system of procedure in each state would have caused less attention to be paid to particular forms of action.

In the middle ages, on the other hand, there was a greater variety of Status, and of Law peculiar to different classes of men, than either before or since. For the last three centuries this has been diminishing, and in the United States the Private Law has become nearly all 'Jus Rerum,' so that the antitheses between it and the remnants of the 'Jus Personarum' are naturally less thought of. But it would be different when the two divisions were more nearly equal.

This view of the intention of the Roman jurists seems to derive support from the authority of Sir Matthew Hale, who, in his 'Analysis of the civil part of the Law,' begins by dividing his subject into:—

(1) Civil Rights and Interests.

(2) Wrongs or Injuries relative to those Rights.

(3) Relief or Remedies applicable to those Wrongs.

He proceeds to divide (1) into (α) Jura Personarum and (β) Jura Rerum.

Hale defines the Civil Rights of Persons as 'such as do either immediately concern the persons themselves, or such as relate to their goods and estate.' So it is clear that he did not regard the Jura Personarum as embracing only those rights as pertain to the person simply without reference to things. His language in the analysis implies that he viewed the law as a whole and not as made up of three distinct parts, in which case he must have regarded the famous passage 'Omne jus, etc.' as an analysis and not as a distribution.

Blackstone, though he follows both Justinian and Hale, follows neither of them slavishly, and it is an interesting question whether the changes which he made were made intelligently and with a clear conception of his own purpose in making them, or whether he has from ignorance or carelessness deserved all the censures laid upon him by Bentham, Austin, and Heron.

The most important change was the addition of the Fourth Book on Public Wrongs, a topic not within the plan of either Hale or the Institutes, but which Blackstone ingeniously adapted to the

stone, do not recognise the distinction between Public and Private Law of course cannot do this.

Analysis of the former, aided by its peculiar division into Rights and *Wrongs*. Some objections may be made to this as a logical division, as a Wrong cannot exist apart from a Right in law, any more than a Negative without a Positive in logic.

But still, as a matter of fact, most of the practical questions that come up for solution in the Courts turn upon the existence of a Right alone, or of a Wrong alone[1]. And the division has another advantage, as furnishing an easy solution for a class of questions that have given the modern civilians a great deal of trouble, viz. Is Civil Procedure a part of the Public or of the Private Law? If part of Public Law, what shall be included under 'Jus Actionum'? Does the law as to private rights of action, the so-called Material law of actions, as distinguished from the Formal, belong to the Jus Actionum or to the Jus Rerum? How are we to state the distinction which Austin has since termed that of 'Primary' and 'Sanctioning' Rights[2]? Blackstone, writing for Englishmen, could have answered these questions in but one way. The English Common Law had grown up round writs and forms of action, and had never been reduced to any other form for practical purposes. The material rights of the parties were grouped round, and determined by, the rules of practice in the various actions, and could hardly be severed from them. The conception of a 'Wrong' as a legal unit or class of units, extending over every act that could give rise to an action, and comprehending every incident from the commission of the act itself to the final execution of the remedy, furnished just the basis required for a convenient classification, and at the same time was but a natural extension of the familiar 'Jus Actionum.'

Very few of Blackstone's acts have been approved by Austin, but Austin warmly commends Blackstone for disregarding the division between Public and Private Law. Nor can Austin and his followers consistently censure Blackstone for ignoring the

[1] Either a Right is admitted, and the question is whether there has been an infraction of the right, as in most criminal cases, and the majority of simple torts; or the act or omission said to constitute a Wrong is admitted, and the issue is upon the existence of the Right as usually in ejectment, breach of contract, etc.

[2] The difficulty as to the proper classification of these rights was felt long before Austin's time. And any classification based upon Rights must always be defective, as no place can be found for Absolute Duties in such an arrangement. I incline to think that if Austin had made Duties instead of Rights the basis of his system of classification, he would have avoided many difficulties.—E.

distinction between Jura in Rem and Jura in Personam [1], as their own theory of the province of Jurisprudence would fully justify Blackstone in treating of nothing but laws or rules from the beginning to the end of his treatise, in which, indeed, he never gives any definition of Rights. In his theory Rights had no place, except as convenient expressions for the consequences of laws.

No fixed and permanent line of demarcation can be drawn between the Jus Personarum and the Jus Rerum, for the simple reason that the notion of the condition that may properly be treated as a Status, with Rights and Duties differing from those of the 'normal' person who is the subject of *all* the rights treated under the Law of Things, must depend upon all the conditions of the law of a particular epoch.

The changeable nature of this conception is now so generally recognised, that it has become almost a commonplace to say that one great feature of modern law has been an advance from the form of a Law of Status to that of a Law of Contract. Hale treats Ancestor and Heir, Lord and Tenant [2], Lord and Villein as examples of Status in the Law of Persons. Blackstone omits them, and if he re-wrote his Commentaries in America at the present day, he would no doubt omit Master and Servant as well. The merit of the division lies in its being conformed to the law of the time, and clearly defined with reference to that law. Blackstone lays down explicitly that all law is, i.e. may be stated as, a Law of Persons [3]. He enumerates the Right of Property among the Jura Personarum [4], and treats it in a strict sense apart from its objects, leaving the objects to be dealt with in the Jus Rerum. His division of the Rights of Persons into Absolute and Relative, though depending on the false theory of the 'Law of Nature' (common to the writers of the time, but unknown in this sense to the Roman jurists), nevertheless coincides accurately enough with the division of most importance to our purpose in comparing

[1] In this Blackstone simply followed Hale, and both thus completely neglect the distinction between Jus in Rem and Jus in Personam, whilst on the other hand the distinction between the Jus Personarum and the Jus Rerum forms the very basis and groundwork of their system.

[2] The special legislation for Ireland which has been in progress since 1868, and the merits of which have been debated with so much fervour, has restored in a very remarkable manner the status of Lord and Tenant. That the changes have been favourable to the latter has nothing to do with the juridical aspect of the question.—E.

[3] Commentaries, Book ii. p. 1.

[4] Commentaries, Book i. pp. 138–141.

Blackstone's system with that found in the Institutes and in the works that followed the Institutes, viz. the division between the Law of Persons in its narrower sense of the Law of Status, and the Law of Persons in the wider sense in which it comprises the whole law viewed as Jus Personarum.

Blackstone's Relative Rights of Persons are thus the English counterpart of the First Book of the Institutes, the Jus Personarum so far as it was thought necessary to discuss it in a separate form.

Blackstone, indeed, goes so far as to reproduce the three kinds of Status (Libertas, Civitas, Familia) wherever analogies could be found in English Law[1]. The really original part of Blackstone's arrangement is to be found in the first chapter of Book I, treating of the Absolute Right of Persons or such as belong to individuals in a state of nature. Though the definition may be set aside with the obsolete theory in whose terms it is expressed, it will be seen that the rights included under it are those which belong to all persons alike, irrespective of family relations, or other peculiarities of status. In other words, this chapter includes that great mass of law which applies to all men alike, and therefore could not be subdivided or arranged conveniently by marks drawn from the persons to whom it belonged; and which for that reason, and for that reason only, was left out by the early civilians from the Jus Personarum and treated as Jus Rerum[2], that is to say, was described, specified, and arranged according to the things or objects to which it applied. Blackstone does not follow the early civilians in this, but neither does he abandon their method entirely and treat the whole law, as he might have done, under the one aspect of Jus Personarum[3]. He reduces the whole to the three great Rights or

[1] Master and Servant corresponding with the 'summa divisio de jure personarum quod omnes homines aut liberi sunt aut servi.' And the chapters on Husband and Wife, Parent and Child, Guardian and Ward, treat of the different status that compose the English 'Familia.' For Civitas he resorts to the Public Law. The German civilians of Blackstone's time followed a similar practice, and had much greater facilities for so doing, since throughout the eighteenth century there were serfs in many parts of Germany whose position furnished Heineccius and others with apt illustrations of Roman slavery. See for example Heineccius, Recitationes, §§ 86–7.—E.

[2] Of course the law relating to the rights and duties of all persons alike was not referred to the Law of Things *because* it related to all *Persons*, but because in the *absence* of any personal distinctions by which to classify it, it had always been classified and described in reference to its various objects.

[3] Austin (vol. ii. p. 754) censures Blackstone for 'putting Absolute Rights of Persons' under the head of Rights of Persons at all. 'As residing in *all*

Interests of Man, viz. Security, Liberty, and Property, and treats of Security and Liberty fully in his First Book so far as the Rights themselves are concerned, leaving infractions of the said Rights, i.e. Wrongs, to be treated with the Jus Actionum in the Third Book. But the Right of Property he treats but very briefly in Book I, and refers his readers to Book II, or Jura Rerum, for all the details of that largest and most important division of the entire subject known as the Law of Property.

Blackstone appears to have intended to transfer to the Law of Persons, and to place among the Rights of Persons, all such Rights and Duties as belonged to all persons alike, *except* such as had for their object 'external things unconnected with the person.' And the change in the meaning of the word 'Thing'[1] adopted by Blackstone, in fact carried with it, as a necessary consequence, all the other changes from civilian precedent which he made. For it is evident that Security, Liberty, Reputation, Health, etc. are all so connected with the person that they cannot be treated as things under the new definition. The right to these is still a Jus in Rem, but no longer a Jus Rerum. So Blackstone placed these rights in that place to which they properly belonged by his definition, namely, with the other rights of persons[2].

persons, these rights are not matter for the Law of Persons, but for the Law of Things; and by the Roman lawyers are so treated.' Austin proceeds to account for Blackstone's error by the supposition that Blackstone overlooked the distinction because the said 'Rights were not explained by the Roman lawyers directly, but only by implication, under the head of Delicts.' But Austin's conjecture does not seem probable; for if Blackstone had followed the Roman lawyers ignorantly, he too would have treated these rights only under the head of Delicts, as he had the best possible opportunity for doing, owing to his peculiar arrangement.

[1] In the classical jurists and among the civilians generally (until within the last century) the term Res and the term 'Object of a Right' are strictly synonymous. No right could be conceived, the object of which might not be dedicated as Res. The right of a man to security, to liberty, to reputation, to health, had for the object of each respectively a 'thing' Res, though that 'thing' was merely the right itself, so to speak, 'objectified.' Hence these rights to Security, etc., could be included among the Jura Rerum, i.e. Rights considered with reference to their objects, they gave rise to actions in Rem and were excluded from the Jus Personarum, which was reserved for Rights appropriated to some particular class of Person. (The strong tendency of all Latin phraseology towards objectivity is well known.—E.)

[2] Blackstone has done this in his First Book as to all Rights but those of Property. On the other hand, he has included in his Second Book all Rights of Property that have for their object 'Things unconnected with the Person.' He of course had some difficulties with 'Incorporeal Hereditaments' and with 'Choses in Action.' But on the other hand, he was particularly favoured by English Law in the matter of Inheritance or Succession, as that law does not recognise the 'Successio per Universitatem,' that has been such a perplexity to the later civilians.

The change thus made by Blackstone in the conception of the Jura Rerum, and in the arrangement of the whole subject that depended upon it, was so consistently carried out by him into all its details and consequences, as to convince anyone (who has carefully examined his work) that Blackstone made the change deliberately and for reasons which seemed to him good and sufficient.

Whether the change thus deliberately made was an improvement is a question which may be stated and considered in two ways. (1) Is the change based on correct principles? (2) Has the change been followed by other jurists?

The answer to question (1) must depend on the view we take of the nature of a Right. Is a Right subjective or objective in its nature? Is a Right something inherent in, or attached to, the person; or is it something external and detached, existing apart from the person, though possessed by it, as implied in the common phrases, to have, possess, enjoy, exercise, lose a right[1]? It may be doubted whether the question presented itself in a definite form to the Roman jurists at all[2]. But if it did present itself it was resolved by them in the second sense. This is implied in the classification of all Rights (Jura) among Res or the objects of the Law. It is implied still more strongly in the incidental allusions to Rights and the general usage of the term by the classical jurists.

Thus Papinian expresses the status of one who is not only free

[1] In modern languages this may probably be a mere inheritance from or imitation of the Romans.

But so far as the Romans themselves were concerned, no one who has ever attempted to write Latin will need to be reminded how constantly his early efforts were marred by employing the modern abstract instead of the ancient concrete and by forgetfulness of the essentially 'objective' character of the Roman mind.—E.

[2] See Sir Henry Maine, 'Early Law and Custom,' pp. 365 seq.: 'The Romans had not attained, or had not fully attained, to the conception of a Legal Right, which seems to us elementary. According to the general usage of the Roman lawyers, "Jus" meant not "Right" but "Law," and usually a particular branch of Law.' Hence the Roman system cannot depend in its arrangement on a conception of legal Right, which had not yet been enucleated, and was in fact but very slowly evolved. In the minds of the Roman lawyers it was entangled with other notions, and was therefore obscure. In the Middle Ages it became clearer, doubtless owing to its examination by the Scholastics. But a clear and consistent meaning was given (for the first time) to the expression 'a Right' by the searching analysis of Bentham and Austin. Hence the objection of Sir H. Maine to the attacks made on the Roman lawyers (who had not yet attained to the conception of a legal Right) for not having anticipated methods of Classification of which Rights are made the basis.—E.

but a citizen and a member of a Roman house by 'genus' or 'gentem habet'[1]; Ulpian, that of one born free by the expression 'possessio ingenuitatis'[2]; whilst Paulus goes so far as to employ the phrase 'possessio servitutis'[3]. And even if this were to a certain extent an unconscious usage, like the colloquial usage of our own day, the Roman notion of a right (so far as the Romans had a distinct notion) was essentially that of something owned or possessed. And after the revival of the Roman Law in the Middle Ages, there can no longer be any doubt or ambiguity on the point. Every right was in the Middle Ages assimilated to a Right of Property. If it had no natural external object, the contents of the Right were figured as an External Object, and this object was regarded as something possessed by the Subject of the Right. In the Canon Law (which reveals the sentiments and ideas of the Middle Ages more clearly than the Civil Law), we find the conception and remedies of Possession applied to a great variety of 'incorporeal' rights, ecclesiastical and temporal offices and dignities, rights of reputation, conjugal rights, etc.[4] Indeed, there was no class of Rights to which the doctrine of Possession did not apply; and wherever the doctrine of Possession applied, the Right as an inevitable result became an object, a thing, unconnected with the person. But Blackstone could not follow his predecessors in this direction without being inconsistent with his own theory of Absolute Rights; and he would also have been inconsistent with the theory that rights are Subjective, inherent in or attached to the Person, which was in his day beginning to supersede the older view upon the Continent, though Blackstone was (we believe) the first to discern the change required by the new theory in the Classification of the Law[5]. This 'Subjective' notion of a Right owes its origin to the theory of a Law of Nature current in the seventeenth and eighteenth centuries; a theory which, however baseless it may have been in itself, led to the modern notion of a Right as something inherent in the person, a Power or Faculty of acting within such limits as the laws prescribe, that

[1] D. XXII. 3. 1.
[2] D. XXII. 3. 14.
[3] D. XLI. 2. 3. § 10.
[4] Traces of this influence on the thought of Germany are distinctly visible in the account given of the rights by Kant.—E.
[5] Savigny's limitation of the doctrine of Possession to rights connected with *external things*, excluding those of personal status and obligations, is a mere corollary to the change made by Blackstone almost half a century earlier.

operates indeed on external things, but which is in itself an essential part of the 'subject's' personality.

The recognition and acceptance of this view by all recent writers on law [1] is too evident to need proof by citations.

[1] None of the recent civilians seem inclined to adhere to the old division advocated by Austin, in which the Law of Things comprehends the entire Law except the mere description of Status.

All of them have a class of Personal Rights corresponding more or less closely to those in Blackstone's First Book. And most modern civilians recognise the accuracy of the distinction first made by Blackstone, by limiting the Law of Things, as he did, to Objects unconnected with the person. Or, to speak more accurately, they usually limit the Law of Things in their own terminology (sachenrecht) still more closely to the Jura in Re, and then introduce a category of Law of Property (vermögensrecht), including both the Law of Things (thus limited) and the Law of Obligations, which corresponds almost accurately with Blackstone's Book II on the Rights of Things.